THE WORD "EQUITABLE" AND ITS APPLICATION TO THE ASSIGNMENT OF CHOSES IN ACTION

MY friend, Professor Cook, has said that the assignee of a chose in action has the legal title thereto.[1] I found fault with this label which he affixed to his interesting illustrations of the alienability of choses in action, contending that the assignee's rights should more properly be called "equitable."[2] In a retort courteous, Professor Cook has elaborated his statement and objected to my description of the assignee's rights as equitable and especially to my further statement, necessarily implied, that because they were equitable they were not legal. In a note to his later article Professor Cook says: "If all that Professor Williston means is to insist that whatever limitations the assignee's 'rights' had when purely equitable they should continue to have when they become concurrent, there is little occasion for controversy between us. Apparently, however, he means much more." In fact, that is all that I mean, if there be added that I wish a terminology which shall indicate my meaning.

I return once more to my thesis not with any undue desire to refute my learned friend in regard to the few matters whereon I differ from him, but simply to explain somewhat more fully the meaning which I attach to my language. I should not undertake to do this as a matter of personal justification; but the same misunderstandings which have made Professor Cook and myself seem much further apart than we are, I am sure, have clouded other legal thought and discussion.

Most of our trouble here, as so often in the law, is due to that ambiguity of language which has been called the worst reproach of the common law. Any attempt to avoid this ambiguity by adopting new terminology meets with difficulty. We are addressing a profession steeped in the old words and phrases, and all the sources of our law in judicial decisions and statutes are expressed in them. While, therefore, new terminology is occasionally un-

[1] 29 HARV. L. REV. 816, 836.

[2] 30 HARV. L. REV. 97.

avoidable, and not infrequently helpful if its equivalence to or difference from older expressions is clearly indicated, we must generally be content with received terminology, making the precise sense in which we use it as clear as may be. Even so, misunderstanding is not always avoided.

Lawyers have become accustomed to the ambiguity which lurks in the words "common law," and when one writer refers to the common law as opposed to statute law, another lawyer is not likely to assume that he means the common law as opposed to the Roman system. But where equity and equitable rights are concerned, perhaps because the various meanings of the words are less sharply defined, there is not infrequent confusion. My learned friend emphatically says:[3]

"If it be 'confusion' to attach to the word 'right' the adjective 'legal' when the right in question is recognized and sanctioned by a court of law, and the adjective 'equitable' when the right is recognized and sanctioned by a court of equity, I must plead guilty to being hopelessly confused, for that is precisely the way in which I have always used these terms. This seems to me to be not only their natural meaning but also the only really useful one to attach to them. To me the confusion appears to lie in the minds of those who assert that there is some 'fundamental' or 'essential' characteristic of 'equitable rights' — aside from the fact that they are recognized and sanctioned by courts of equity — which differentiates them from all other classes of 'rights' and requires us to regard them not merely as equitable but as *exclusively equitable and not legal*, even after they have come to be fully recognized and sanctioned by courts of law as well as by courts of equity."

There is, of course, no confusion or impropriety in using the word "equitable" and "legal" with the meanings stated in this quotation. They are unquestionably the primary meanings of the words. But the words have other meanings, and I indicated that I was using them in another sense. I am treading in the footsteps of many distinguished judges and lawyers; and while even such authority cannot make an unsound principle sound, it can give a meaning to a word in legal writing, not open to successful attack. The word "equitable," as applied to rights, has not only the meaning with which I used it, and also that which my friend prefers, but it has others. It has at least the following meanings:

[3] 30 HARV. L. REV. 460.

1. Exclusively enforceable in courts of chancery;

2. Enforceable in courts of chancery, though not exclusively;

3. Originally enforceable in courts of chancery though no longer so, but retaining characteristics which distinguished the right in question when enforced in chancery;

4. Having characteristics of rights enforced by courts of chancery, though neither now nor at any other time enforced in such courts;

5. Fair or just.

It may be, and doubtless is, unfortunate that one word should have such a variety of meanings, and a law writer may perhaps prefer to confine his own use of the word to something less than all of these meanings, but that all of them are in good current legal use, a little reflection will readily convince the most skeptical.

I presume this will hardly be doubted so far as the first two meanings are concerned. It is the third meaning which seems to excite hostility in some writers and teachers of law; but when a court or a statute speaks of an equitable defense to an action at law, the chances are that the court or the statute is not referring to a proceeding in chancery to obtain an injunction, but to a plea in an action at law. It is in this sense that courts have used the word in the scores of cases where the right of an assignee of a chose in action has been called "equitable," though his action was necessarily brought in a law court. An assignee has for centuries recovered in an action at law; and for more than a century has rarely had occasion to ask the aid of a court of equity. He was not allowed to proceed in equity in any ordinary case,[4] and without the aid of any statutes allowing equitable pleas, and long before such statutes were passed, a court of law afforded the assignee protection against defenses of the debtor acquired after notice of the assignment.[5] Courts which during the nineteenth century called the rights of the assignee equitable must, therefore, have been using the word "equitable" not as meaning enforceable in chancery, but as retaining certain "fundamental" or "essen-

[4] Since Cator *v.* Burke, 1 Brown's Ch. 434 (1785), where an assignee brought suit in equity against the maker of a bond and his bill was dismissed because his remedy should have been at law, it has been settled that the assignee's exclusive remedy was in courts of law.

[5] See *e. g.* Winch *v.* Keely, 1 T. R. 619 (1787); Welch *v.* Mandeville, 1 Wheat. (U. S.) 233 (1816); and cases cited by Professor Cook, 29 HARV. L. REV. 824–28.

tial" characteristics of equitable rights. It is in this sense that the word is habitually used in code states where law and equity are said to be "merged." There are no longer courts of chancery in such states, but certain rights retain not only the characteristics of their former days when they were enforced by courts of chancery, but also the name.

It would be easy to add further illustrations of this use of "equitable," but this seems unnecessary.

An instance of the fourth use may be found where a court says, as courts so often say, that an action for money had and received is an equitable action, and this statement, I think, will carry to the minds of most lawyers a more definite idea than that the action is based on principles of fairness.[6]

Analogous to this is the common usage which my friend criticizes of calling various negotiable defenses to a negotiable instrument, equities. This he deems erroneous, but he will not doubt that it is current usage of courts, and if it is considered that a maker induced by fraud to sign a promissory note may maintain a bill in equity to regain the note, and that the boundaries of his defense when sued at law on the note are identical with those of his right to maintain a bill in equity against a holder of the instrument, the current usage may not seem strange.

For the fifth meaning of "equitable," it is enough to refer to the dictionary.

One who in the discussion of legal theory uses the word may fairly be expected to make it clear in which of these meanings he is using it; but he can hardly be reproached if he does this for using the word in any of these senses. The simplest way that occurs to me of avoiding a part at least of the ambiguity is by using the word "chancery," instead of "equity" for the description of mere questions of procedure. But, in any event, one who

[6] "It has been held that the action for money had and received, being an equitable remedy, lies generally where a bill in equity will lie, and that decisions, therefore, in Chancery, which recognize the principle, may be justly held to sustain it. Culbreath *v.* Culbreath, 7 Ga. 64, 50 Am. Dec. 375, 381. This has been thought, however, to be too broad and indefinite a statement. The better rule is laid down in Moore *v.* Mandlebaum, 8 Mich. 433, 448, to the effect that as a general rule, where money has been received by a defendant under any state of facts which would, in a court of equity entitle the plaintiff to a decree for the money, when that is the specific relief sought, the same state of facts will entitle him to recover in an action for money had and received." Bither *v.* Packard, 115 Me. 306, 312, 98 Atl. 929, 932 (1916).

wishes to understand Anglo-American law as it has been written, must be prepared to recognize these different meanings, and must also be prepared to recognize a corresponding ambiguity in the antithesis to "equitable." The antithesis to the fifth meaning which I have given of that word is "inequitable," but the antithesis in each of the other cases can be nothing but "legal," which has, moreover, still another meaning as opposed to "illegal." If, then, a right is said to be equitable, rather than legal, and "equitable" appears or is stated to be used in the sense of having or retaining the characteristics of a right enforced in chancery though now enforced at law, it should not be understood as a denial that the right has any of the characteristics of a right enforced by a court of law, for obviously it has the particular characteristic of being itself enforceable in a court of law; but that it preserves or has some fundamental characteristics of rights enforced in chancery which differ from rights ordinarily enforced by a court of law.

Though Professor Cook summarizes my argument with verbal fairness,[7] the ambiguity of meaning in "legal," and "equitable," lurks in his summary, and in his subsequent discussion, by giving to those words the meaning which he uses as their exclusive one, he magnifies a difference between us into undue proportions. In the main we agree.

Not only do I assent to the statement of Professor Cook quoted at the beginning of this article, but I also cordially agree with his statement that "the ownership of a chose in action is a complex aggregate of jural relations." He criticizes my statement of his position as inadequate for a failure to recognize that the assignee instead of "a right," has a variety of rights, privileges, powers, and immunities. I must express my regret for any inadequate presentation of his views; yet in different language, it was also my purpose to insist upon, what he insists upon, namely, the lack of all the incidents of full ownership in the assignee. To speak of him as "owner," is an ambiguous statement which cannot well be traversed or admitted. The same may be said of the statement that the assignee has a "legal title." If by this is meant that the assignee enforces his rights in a court of law, it is certainly true, and has been for centuries; and it would please me better to have that idea expressed in that way.

[7] 30 HARV. L. REV. 462.

As I cordially agreed with most of what Professor Cook wrote, I did not deem it necessary to repeat all that he had written. What I criticized, and still criticize, is that after having explained that the assignee, prior to notice to the debtor, has not all the rights, privileges, powers, and immunities of full ownership, he thereafter habitually calls the assignee "owner" and possessed of the "legal title," and gives the weight of his approval to the equally ambiguous statements of others.

It is because I deem it important to define the extent of the ownership of an assignee, that I believe it to be desirable to speak of his ownership as "equitable."[8] If that word is given the meaning which I have ventured to give it, I believe that this will without elaboration define in a not inexact way the rights, privileges, powers, and immunities of an assignee of a chose in action, not only as they are generally in the law today, but as they ought to be.

I quite agree also that when any property is alienated the assignee is invested by the law with rights similar to the assignor's and does not, strictly speaking, become the owner of the same rights.[9] There is, however, this difference between contractual choses in action, at least,[10] and other property, that while the boundaries of most rights and liabilities are determined by the law without a hampering general principle, so that a transferee of most property can be given such rights as may seem advisable, it is otherwise in the case of contracts. The law in recognizing their validity has established the principle that the boundaries of contractual obligation are fixed by the expressed mutual assent of the parties. The law may give defenses to contracts or limit their operation for any reason of policy without regard to expressions of assent by the parties, but if it imposes liability upon them different from that which they have assumed in terms express, or fairly to be implied, it is violating an established principle. And this it certainly seems to do when it holds A liable to C (an assignee) without his assent on a contractual obligation to pay B (an assignor). Where, however, the difference in the nature of the obligation is merely formal or of negligible practical importance,

[8] If in every case where I have used "right" or "rights" in this and in my preceding article the words "privileges, powers, and immunities" be added, in the reader's mind my argument will not be affected.

[9] See also AMES, LEGAL ESSAYS, 194. [10] Compare AMES, LEGAL ESSAYS, 210.

the technical objection may be and has been disregarded. Otherwise a state bankruptcy law, such as was in force in a number of states prior to 1898, vesting title to the bankrupt's contracts in his assignee, would have violated the clause of the federal constitution prohibiting the impairment of contracts.

I agree that the "equitable origin [of the rights of the assignee] must never be lost sight of if we are to understand the present state of our law;"[11] and I think the best way to avoid losing sight of this important fact is to call the right or ownership, or rights, privileges, powers, and immunities of the assignee equitable. The surest way to induce losing sight of the origin, or to induce the belief that the origin is now of no importance, is to say the assignee is the owner and has the legal title.

I also agree that if the assignee gives notice of his assignment to the debtor, and no invalidating circumstance has happened between the assignment and the notice, the assignee is vested with all the rights, privileges, powers, and immunities of an owner. Why then bother about calling his ownership equitable? Because it furnishes an answer to other situations than that just supposed and enlightens us on the effect of the assignment without the notice.

I see little occasion for discussion whether the right of the assignee is equitable in any other sense of the word than that in which I have used it, but I certainly agree with Professor Cook's proposition that the ownership of the assignee, such as it is, is "concurrently legal and equitable" in the sense that it is "recognized and sanctioned both by common law and equity." Could any one doubt it? Certainly, I do not.

I more than cordially agree with Professor Cook's statement that even if it be admitted argumentatively that rights enforced by courts of equity have such a fundamental characteristic as I have attributed to them,

> ". . . it does not follow that they *necessarily* lost this characteristic when in the course of the development of our law they came to be recognized and sanctioned by courts of law. . . . There is no *inherent* reason why the chancellor should change his views as to their scope, or why the law court, recognizing their historical origin may not give them precisely the same limitations they previously had when exclusively equitable."[12]

[11] Professor Cook, 29 HARV. L. REV. 831.

[12] 30 HARV. L. REV. 467. (Italics are Professor Cook's.)

My whole essay was aimed to establish the truth of this statement put in the positive form that there is an inherent reason why the law courts, not only because of the historical origin of the rights in question, but because of the fact that thereby just results will be secured, should give them their old limitations.

The misunderstanding between Professor Cook and myself, I conceive, to have been chiefly due to the fact that we are interested primarily in different aspects of the question, and therefore lay our emphasis differently. His interest seems largely in theoretical classification and analysis of jural relations, and in what is "intrinsically necessary." I do not dispute the value of such work, but it is not my primary interest. My main concern is wholly practical, both in regard to the results achieved concerning choses in action, and in regard to terminology. When I speak of what is "possible," I refer to what seems to me a legal possibility for a court bound by the system of Anglo-American common law, not to what is a conceivable idea in general jurisprudence.

In a passage that I have quoted from my learned brother's essay, he doubts the existence of essential or fundamental characteristics in rights developed by courts of chancery. He also casts doubt upon the generality of application of the principles of purchase for value,[13] and the allegation that an innocently acquired legal title will prevail over an equitable right he regards as a striking example of formalistic jurisprudence.[14] Here, I cannot go along with him. I should be reluctant to believe that the jurisdiction of chancery had no further unifying characteristic than that of a kind of trespass on the case, developed to include odds and ends for which the legal writs afforded no redress. In its origin doubtless this may describe chancery jurisdiction, but without imitating Blackstone in his admiration of the laws of England, I take pleasure in believing that for centuries, not only has it been characteristic of the rights enforced by equity that they are directed primarily against one person, and secondarily against those who stand in no better position (that is, donees or purchasers with notice); but that this way of working out most of the legal problems with which equity has had to deal is valuable and should not be given up. If this is true, it follows as a natural and necessary consequence of the essential characteristics of personal rights, that a right to property

[13] 30 HARV. L. REV. 476.

[14] 30 HARV L. REV. 481.

which is valid against one person, or set of persons, is ineffective when title to the property gets into the hands of another person. Such a rule is no more "formalistic" than the rule that a purchaser of real estate from one who has already conveyed it, acquires title if he is a purchaser for value without notice, and the prior conveyance has not been recorded. "Axiomatic" is a better word than "formalistic" to express the rule.

Even if I had no faith in the principles to which I have just referred, I should still advocate a method of speech not misleading to courts and lawyers who still preserve their faith in them.[15]

Professor Cook argues that the terms "ownership" and "legal title," may well be applied to the qualified ownership of an assignee because of the analogy of the recording acts. I believe it is not wholly by accident that the best illustration which he can find for a dealing with rights by courts of law in a manner analogous to that of courts of chancery is that furnished by recording acts — a modern statutory creation. The illustration proves that there is no impossibility in achieving through the procedure of a court of law the results achieved in many instances by courts of equity, but it certainly does not show that the common law has tended to develop a similar kind of qualified ownership; or even that common-law courts, however unnecessarily, have not been antagonistic to it.

The subject is a large one and worth a much fuller treatment and illustration than it is in my power to give, but I will submit a few suggestions in support of my belief that there is a real danger that the old boundaries of an assignee's rights first established by courts of equity, and afterwards adopted by courts of law, will be lost sight of when the assignee sues in his own name if his right is described as a legal title; or when it is said without more that the assignee of a chose in action is the owner of it.

The doctrine of *stoppage in transitu* was first developed by courts

[15] For example, a few weeks ago the Supreme Court of the United States said in Duncan Townsite *v.* Lane, 245 U. S. 308, 311 (1917): "The doctrine of *bonâ fide* purchaser for value applies only to purchasers of the legal estate. Hawley *v.* Diller, 178 U. S. 476, 484 (1899). It 'is in no respect a rule of property, but a rule of inaction.' POMEROY, EQUITY JURISPRUDENCE, § 743. It is a shield by which the purchaser of a legal title may protect himself against the holder of an equity, not a sword by which the owner of an equity may overcome the holder of both the legal title and an equity. Boone *v.* Chiles, 10 Pet. (U. S.) 177, 210 (1836)."

of equity,[16] and it is probable that had the right continued to be enforced by courts of equity, it would have been available, like other equitable rights, against all but innocent purchasers for value;[17] and that the price due under a subsale could have been subjected to the creditor's right if the goods themselves had passed into the hands of such a purchaser, but courts of law having taken charge of the matter, have fixed different boundaries to the right, which are arbitrary, and based, I venture to believe, not on teleological considerations, but on ignorance and procedural inadequacies.[18] The seller's rights are still qualified now that they are enforced by courts of law, and the qualifications are in effect narrower than those imposed in equity; but the main point is that they are different, and I think worse than they would have been had the fundamental and essential characteristic of an equitable right been preserved.

It is interesting to observe the different results which have been achieved in mortgages, and in conditional sales of chattels. The inability (not necessary but actual) of courts of law to recognize ownership qualified on equitable principles has made a confusion of the latter subject which can be cured only by statute. In dealing with the security of a mortgage involving the same situation in all but form, courts of equity have established the principles which should govern a title held merely for security; and when they had thus clearly marked out the road which should have been followed, there is no inherent reason why courts of law should not have been able to work out analogous results with conditional sales. But for the most part they have failed to do so[19] — not from any inherent inadequacy of procedure, but from an inability to understand clearly that a seller might have the "legal title" and the buyer a beneficial ownership which should be a property and not simply a contract right.

The same difficulty in recognizing ownership qualified on equitable principles, has prevented courts from dealing satisfactorily with the rights of parties in goods shipped under bills of lading. In order to secure payment to the seller of the price of goods or to secure a loan by a banker who has advanced the price, bills of

[16] Wiseman *v.* Vandeputt, 2 Vernon, 203 (1690); Snee *v.* Prescot, 1 Atk. 245 (1743).

[17] See the opinion of Hardwick, in Snee *v.* Prescot, 1 Atk. 245 (1743).

[18] See WILLISTON ON SALES, §§ 525, 536–38.

[19] WILLISTON on SALES § 579

lading are constantly made out to the order of the seller or of the banker when they are shipped in conformity with an order of a buyer, or under a contract with a buyer. That the consignee named in the bill of lading or the holder of it to whom it was assigned for security has a property interest in the goods, and that, nevertheless, the buyer also has a property right, has seemed extremely difficult for the courts of common law to grasp,[20] although such a conception clearly underlay the customs of the merchants who adopted the methods in use. That one or the other party must have the "legal title," and if one has it the other can have only a contract right, has seemed to too many courts a necessary truth. It has taken statutes to correct this evil.

The qualified ownership derived from an infant or insane person, or one under duress, also may profitably be compared with ownership qualified on equitable principles by fraud or mistake in its acquisition. Where the limitation was established by courts of law attention seems to have been centered on the character of the original transaction, and the hardship to a subsequent innocent purchaser who obtained title in good faith was not weighed against the hardship of the original owner.[21] So far as duress is concerned, this has been changed in modern times under the influence of courts of equity.[22] It was comparatively easy for courts of law to make this change of the rule in regard to duress, because not only did they have the example of the equitable defenses of fraud and mistake, but the doctrine of undue influence could not well be kept permanently separate from the doctrine of duress, though even yet the boundaries of the latter doctrine are injuriously affected in many jurisdictions by the narrow limitations of the common law.

I cannot see that there is any danger whatever that an assignee, if his right, title, or ownership is described as equitable, is likely to be deprived of any of the rights, privileges, powers, and immunities which Professor Cook and I would both give him; but I feel satis-

[20] See WILLISTON on SALES, §§ 281, *etc.*

[21] "The law regards chiefly the right of the plaintiff and gives judgment that he recover the land, debt, or damages because they are his. Equity lays stress on the duty of the defendant, and decrees that he do or refrain from doing a certain thing because he ought to act or forbear." AMES, LEGAL ESSAYS, 232.

[22] For the early law see Sheppard's Touchstone, page 61: "For if one threaten another to kill or maim him, if he will not seal a deed to a stranger, and thereupon he do so; this is void as if it were to the party himself." The modern law is shown by Fairbanks *v.* Snow, 145 Mass. 153, 13 N. E. 596.

fied that when the assignee is simply said to be the "owner" of the chose in action and to have the "legal title" thereto, many will enlarge the scope of his rights, privileges, powers, and immunities beyond what they have been in the past and beyond what I believe to be just. And for the most part, they will do this not because of any consideration of teleological fitness, but by mechanical reasoning from the words "owner" and "legal title." The idea is so ingrained in the mind of the modern judge, lawyer, and layman, that all property and all rights are assignable, that emphasis must be laid on limitations rather than the reverse. I find that most members of a first-year class, consisting of intelligent college graduates, generally assume at the outset of a discussion of the subject not only that all rights in choses in action can be effectively assigned, but that all duties under them may also be assigned.

The statutes which purport to vest legal title of the chose in action in the assignee,[23] are not, I believe, carefully reasoned enactments for the purpose of enlarging the rights of an assignee in any other than a procedural way; but certainly they seem to justify an argument that their effect is more than procedural. I have at least one learned friend who holds this belief. Probably when an English judge said that "Henceforth in all courts a debt must be regarded as a piece of property capable of legal assignment in the same sense as a bale of goods,"[24] he meant more than the judge who said that the Judicature Act does not "give any new rights, but only affords a new mode of enforcing old rights;"[25] but how much more I do not believe he had defined in his own mind.

The second mode of expression marks boundaries exactly, the first does not. If, as I infer from the passage quoted from Professor Cook, near the beginning of this article, he agrees with me that the rights, privileges, powers, and immunities of the assignee are or should be changed only procedurally by the allowance of an action in his own name, I should regret to lose, on account of any difference in terminology, an ally in the war against those who would give the assignee more enlarged substantive rights.

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[23] 30 HARV. L. REV. 105.
[24] Fitzroy *v.* Cave, [1905] 2 K. B. 364, 373.
[25] Walker *v.* Bradford Old Bank, 12 Q. B. D. 511, 515 (1883).